86-135

Supreme Court, U.S.
FILED
JUL 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Respondent,

vs

RICHARD A. JARVIS,

Petitioner,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. DID THE COURT ERR IN DENYING THE MOTION OF RICHARD A. JARVIS, TO DISMISS, BASED ON GROUNDS OF DOUBLE JEOPARDY.

II. DID THE COURTS DETERMINATION THAT A MISTRIAL WAS REQUIRED BECAUSE OF JUROR PREJUDICE, OVER THE OBJECTIONS OF RICHARD A. JARVIS, MEET THE STANDARDS OF "MANIFEST NECESSITY."

III. WAS THE MATERIAL FACTS OF THE CASE MISAPPLIED.

IV. DID THE COURTS DECISION CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER CIRCUIT COURTS REGARDING DOUBLE JEOPARDY.

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PETITION

Petitioner Richard A. Jarvis seeks a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals which affirmed the denial of his motion to dismiss on grounds of Double Jeopardy.

MEMORANDUM AND DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals issued an unpublished memorandum under date of April 21, 1986, denying the appeal of Richard A. Jarvis from the District Courts denial of his motion to dismiss on grounds of double jeopardy. Their memorandum is enclosed in the appendix to this petition.

A Petition For Rehearing By Panel And En Banc was submitted to the Ninth Circuit County Appeals on May 5, 1986. This petition was rejected by the court on May 14, 1986. This Petition for Writ of Certiorari follows.

JURISDICTION

This case should be reviews on writ of certiorari since the Ninth Circuit Court of Appeals has decided a question of Fifth Amendment Right that is in conflict with the applicable decision of the United States Supreme Court. This decision was rendered on April 21, 1986, and the Petition for Review En Banc was denied by the court on May 14, 1986.

The Appellant court decided an issue dealing with Double Jeopardy on grounds that are inconsistent with the view of the United States Supreme Court and other Circuit Courts of Appeals. The settlement of this questions will be important to the public at large by establishing a clear and concise rule of law in regards to the issue of "Manifest Necessity".

Jurisdiction for writ of certiorari is granted by Title 28 United States Code, United States Supreme Court Rule 17, Egan v. City of Aurora, Illinois, 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed2d 741 (1961), and Wilkinson v. United States, 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed.2d 633 (1961).

The Jurisdiction in the Circuit Court of Appeals was Title 21, United States Code 1291, which makes the denial of a motion on grounds of double jeopardy a "final decision", and is immediately appealable and Abney v. United States, 431 U.S. 651, 655-56 (1977).

CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution states. . .

> "[N]or shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."

United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) states. . .

> "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."

STATEMENT OF FACTS

Richard A. Jarvis was indicted by a Federal Grand Jury, along with four (4) co-defendants on September 4, 1985, for violation of the Federal Drug Laws.

On November 12, 1985, a jury was empaneled and heard opening arguments from the prosecution and counsel for the five defendants. Government witnesses were called and testified. On the second day of trial, after the lunch break, defense counsel for Jarvis' co-defendants reported to the Court that all the jurors saw Mr. Jarvis' four co-defendants being transported from the courtroom in shackles. In addition to the individual shackles, the four co-defendants were all connected by one long chain. Several United States Marshals were guarding the shackled defendants by the elevators, the co-defendants counsels reported in graphic detail that the jurors stared at the shackled defendants while waiting for an elevator.

Defense counsel for the four co-defendants argued that this confrontation would have a

prejudicial effect on the jurors and would taint the remainder of the trial.

Defendant Jarvis disagreed and argued that this would not affect him, since he was not with the co-defendants.

All four of Jarvis' co-defendants moved for a mistrial. Jarvis' counsel objected along with the Government. After hearing argument by the Defendants and hearing the government's opposition, the Court initially denied the mistrial motion, and the trial continued. However, approximately two hours later the Court recessed the proceedings and requested counsel to enter chambers. In chambers, the Court indicated that it was greatly concerned by the defendant's motion for mistrial. The Court requested counsel for the Government research the issue of granting a mistrial and further informed counsel that the Court would also independently research the issue.

In chambers, Jarvis' attorney strongly objected to a mistrial and advised the Court that no prejudice would result to Jarvis, since he was not with the shackled co-defendants. Jarvis' attorney

further advised the trial judge that there could not be any spill over effect or guilt by association because some of the jurors had, in fact, seen Jarvis across the street at the mall having lunch with his attorney. Obviously, he would not be associated with the co-defendants being shackled. Jarvis' attorney requested that if the Court mistried the co-defendants, that it continue the trial with Jarvis, since the trial had already gone on for two days, all of the government witnesses were available and all of the physical evidence was in the court room as well as the fact that Jarvis wished to continue with this jury. Approximately 30 minutes later, Government counsel provided the Court with several legal authorities on the subject.

After considering the authorities cited by the Government, the judge took the bench and heard extensive argument from both the Government and from co-defendants' counsels. During the Government's argument, Government's counsel suggested to the Court that a less drastic measure to granting a mistrial would be to question the jurors about the incident and, if it appeared that

they could be fair in spite of what they saw, they could be instructed not to consider the event during their deliberations. Government counsel also indicated that he was open to any reasonable alternative proposed by defense counsel short of a mistrial. None of the attorneys representing the co-defendants proposed any alternative to granting a mistrial although defendant Jarvis indicated his desire to proceed with the trial.

During the discussion, the Court noted that the decision of whether to order a mistrial as to all the defendants was within the Court's discretion.

After consulting with all the parties and having carefully considered alternatives to granting a mistrial, the Court determined that the possibility of juror bias necessitated discharging the jury. In reaching its decision, the Court stated, "after due reflection I believe that the defendants' rights were compromised". The Court stressed that what the jurors saw would have a detrimental effect on all of the accused's right to be presumed innocent of the charges. The Court further expressly found that

Mr. Jarvis' right to a fair trial had been jeopardized because the jurors would infer Defendant Jarvis' guilt by his association with the other shackled defendants. Finally, although not a determinative factor, the Court considered that there had been only one day of testimony in a trial that was scheduled to last a week, and therefore the hardship of granting the mistrial at this point in the proceedings was reduced".

After denial of his appeal to the Ninth Circuit, Richard A. Jarvis was brought to trial in the Southern District of California on May 14, 1986. He was found guilty as charged and on July 7, 1986, sentenced to eight (8) years in the custody of the United States Attorney General. This Writ of Certiorari follows.

The Jurisdiction of the District Court for the Central District of California was invoked by the indictment of Richard A. Jarvis, the Defendant, charging him with violation of Federal Statute 21, United States Code section 846, 1952 and 2.

ARGUMENT

I.

Introduction

The District Court declared a mistrial over defendant's objection. It did this on the basis that other defendants had been seen in shackles. Defendant desired to proceed and sought severance because his attorney believed that it was in his best interest to complete the trial and if anything, seeing co-defendants benefitted rather than hampered his defense. The trial judge, as a justification for the decision to deny severance and complete the trial, surmised that the jury possibly might infer that Jarvis was guilty by association. This postulated prejudice was found even though Jarvis had already tendered the defense of entrapment and did not deny the facts and wanted to show that the co-defendants were bad people and that he was not.

The present case is appropriate for a hearing by this court because it is one of great importance to the preservation of the constitutional

guarantee that a defendant not be placed twice in jeopardy. The issues posed in the appeal and the petition for re-hearing by panel and en banc should be of gravest concern to district judges, appellate judges, and all who favor the preservation of constitutional liberty.

The constitutional guarantee against being placed twice in jeopardy is a fundamental one, and the burdens of a double trial also impinge other constitutional guarantees of effective assistance of counsel, of trial by jury, of effective cross-examination and of meaningful due process.

The importance of this question should not be hidden from scrutiny by an unpublished memorandum opinion, but should be evaluated in the solvent of judicial and public opinion. If constitutional liberties are to be diluted by judicial decision, then this dilution should be in the open for all to see.

The important question to be resolved is whether the standard of "manifest necessity" is really the standard to be applied in the Ninth Circuit. If a trial judge must apply this standard

in declaring a mistrial over a defendant's objection, then this standard should not be nullified by the subterfuge of a standard of review, which allows a district judge to imagine a rationale to justify a patently irrational decision.

The District Court did not carefully consider Mr. Jarvis's rights, did not take evidence as to jury bias, and simply contrived prejudice to Jarvis to rationalize its own desire not to have two separate trials. It merely surmised, contrary to the belief of defendant's counsel and over his objection, that since Jarvis was a co-defendant, the jury could well infer guilt by his association with the other shackled defendants.

I. LIMITED SCRUTINY BASED ON RATIONAL BASIS IS NO SCRUTINY. A TRIAL COURT MAY BE ABLE TO RATIONALIZE A VIOLATION OF THE CONSTITUTION, BUT SUCH RATIONALIZATION IS IRRESPONSIBLE.

The violation of any law, even the United States Constitution, may be rationalized by those who violate it. Limited scrutiny on a rational basis standard is no scrutiny. But even the limited scrutiny standard rationally requires that the standard be exercised responsibly, and to contrive a justification over counsel's objection under the facts of the present case was irresponsible.

Responsibility involves being called upon to answer for one's acts or decisions, to fulfill one's obligations, and to choose between right and wrong. A contrived answer or excuse is none at all. A superficial review of a double jeopardy claim is no review. A statement that "manifest necessity" compelled a mistrial, in light of the facts that it clearly did not, is prevarication, and to deprive a presumably innocent man of the constitutional

guarantee against being placed twice in jeopardy is wrong.

The trial judge did not question the jury to determine if anyone was affected by seeing the defendants in shackles. He did not consult the holdings of precedent cases of the Ninth Circuit, nor the United States Supreme Court.

A. THE DECISION IS CONTRARY TO UNITED STATES SUPREME COURT STANDARD PERMITTING MISTRIAL ONLY IN EXTRAORDINARY AND STRIKING CIRCUMSTANCES.

Discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100.

The record supports the fact that the judge did not apply this dictum to this case.

B. THE DECISION IS CONTRARY TO NINTH CIRCUIT DECISIONS WHICH DO NOT AUTHORIZE A MISTRIAL MERELY BECAUSE DEFENDANTS ARE SEEN IN SHACKLES.

The government, through counsel, advised the court of case law in the Ninth Circuit which was ignored by the trial judge.

If this court will reconsider the facts of this case in light of the material facts and the issue of "Fair Trial", the decision of the trial court and the Ninth Circuit cannot be upheld.

The Ninth Circuit in United States v. Acosta-Garcia, 448 F.2d 395 (9th Cir. 1971) states. . .

> "We do not agree. The mere fact that some prospective members of the jury may have seen appellants in handcuffs is not so prejudicial as to require a mistrial, Loux v. United States, 389 F.2d 911 (9th Cir. 1968), particularly where, as here, the trial court took great pains to explain that this occurrence was to have no bearing on the jury's consideration of the merits of the case against appellants."

United States v. Figueroa-Espinoza, 454 F.2d 590 (9th Cir. 1972) holds. . .

> "The fact that some of the jurors may have seen appellants in handcuffs was not so inherently prejudicial as to require a mistrial without more. See United States v. Acosta-Garcia, 448 F.2d 395 (9th Cir. 1971). In this case the incident was not an aggravated one. Appellants did not request a corrective instruction. In all the circumstances we conclude that the district court did not abuse its discretion in denying the motion."

Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976) holds:

> ". . .Corley asserts that his exposure to the jury in manacles on two occasions deprived him of due process. Corley made motions for a mistrial based on these alleged exposures. After an evidentiary hearing, the court below found that on one occasion Corley was exposed to the jury in manacles and that it was possible that some jurors may have seen him in manacles on another occasion. The trial court found that but one juror had seen Corley in manacles and that there was no prejudice."

In United States v. Leach, 429 F.2d 956 (8th Cir. 1970) the court states:

> ". . .There is no merit to the contention that the court should have granted a mistrial because some

> of the jurors saw the defendants in handcuffs as they passed through the hall. Roy Roberts was out on bond and was not handcuffed. It is a normal and regular as well as a highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this. This is necessary to prevent an escape and possible injury to others in an escape attempt. It appears that from the construction of the building it was necessary for the jurors and the defendants to use the same corridor to get to the court-room. No prejudice was shown and the court did not err in refusing to grant a mistrial."

The Government supplied the Trial Judge with law on the subject of mistrial.

Did the Government supply the Judge with the aforementioned cases. Did the Judge consider what other court's had done in the past?

The Judge did not act rational and responsible in ignoring the government's counsel's advise to not mistry the case.

The record and the material facts do not support the District Court's determination that potential juror bias justified a mistrial. Manifest necessity did not exist.

C. THE PANEL DECISION IS CONTRARY TO A DECISION OF THE UNITED STATES SUPREME COURT DECIDED AFTER THE BRIEFS IN THIS CASE.

The decision by the United States Supreme Court on March 26, 1986, in the case, Holbrook v. Flynn, ____ U.S. ____, 38 Crim. Law Reporter 3217 concerns the issue of Fair Trial. This decision was rendered after briefs in this case were filed.

In this case, four state troopers in uniform and armed were stationed in the front row of the spectors section to supplement the Court Security Force.

The defendants alleged prejudice in that they could not get a fair trial. The United States District Court for the District of Rhode Island denied respondents writ. The Court of Appeals, First Circuit, reversed the District Court.

Writ of Certiorari was granted by the United States Supreme Court. The United States

Supreme Court held in Holbrook v. Flynn, supra. . .

> "The troopers' presence at respondent's trial was not so inherently prejudicial that he was thereby denied his constitutional right to a fair trial.
>
> (a) While an accused is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, this does not mean that every practice tending to single out an accused from everyone else in the courtroom must be struck down.
>
> (b) The conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state interest. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial. In view of the variety of ways in which such guards can be deployed, a case-by-case approach is more appropriate.
>
> (c) Whenever a courtroom arrangement is challenged as inherently prejudicial, the question is not whether the jurors articulated a

> consciousness of some prejudicial effect, but rather whether there was an unacceptable risk of prejudice. In this case, there is no justification for finding such an unacceptable risk based on the troopers' presence. Even if the jurors had been aware that the deployment of troopers was not common practice, there is no reason to believe that the troopers' presence tended to brand respondent with guilt. Their presence was unlikely to have been taken as a sign of anything other than a normal official concern for safety and order. Moreover, even if a slight degree of prejudice could be attributed to the troopers' presence, sufficient cause for their presence could be found in the State's need to maintain custody over defendants who had been denied bail. The troopers' presence was intimately related to the State's legitimate interest in maintaining such custody and thus did not offend the Equal Protection Clause by arbitrarily discriminating against those unable to post bail or to whom bail has been denied."

A rational responsible person, such as those that comprised the jury in this case, are well aware that people who are charged with a crime are put in jail. That people who are in jail are to be detained. That the persons who are charged with the safety and security of the detainee must use safeguards and that handcuffs and shackles are

part of every day life in our system of jails and prisons.

To determine that Jarvis could not get a fair trial was an error by the District Court.

The Judge abused his discretion as can be seen by the holding of the United States Supreme Court.

The Fifth Amendment of the United States Constitution states:

> ". . .[N]or shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."

The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this nation's independence. As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. The plea of autrefoits acquit, or a former acquittal, he wrote, "is grounded on this universal maxim of the common law

of England, that no man is to be brought into jeopardy of his life more than once for the same offense." The idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice. Benton v. Maryland, 89 S.Ct. 2056 (1969).

In Downum, the Supreme Court stated, "We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary discretion."

II. WHERE A MISTRIAL IS DECLARED BECAUSE OF ERRORS OR OMISSIONS BY THE COURT OR THE GOVERNMENT RATHER THAN MATTERS BEYOND THE CONTROL OF EITHER, THE STANDARD OF REVIEW IS STRICT SCRUTINY.

ARIZONA V. WASHINGTON and JARAMILLO INVOLVED MISTRIALS CAUSED BY THE DEFENSE OR MATTERS BEYOND THE CONTROL OF THE PROSECUTION OR THE COURT AND WERE ERRONEOUSLY APPLIED IN THE PANEL DECISION.

The panel decision relied upon Arizona v. Washington, 434 U.S. 497, (1978), and United States v. Jaramillo, 745 F.2d 1245 (9th Cir. 1974) to justify the application of "limited scrutiny" in this case. In Arizona, a mistrial was declared because of an improper mistrial by the defense. In Jaramillo, a mistrial was declared because the trial judge had been indicted, a matter clearly not within

his control. In the present case, a mistrial was declared because the Marshal's office negligently and carelessly allowed jurors to be seen in shackles.

Carelessness by government is within both the court's and the government's control. Certainly this carelessness should not be allowed to be utilized as a justification for denying defendant his constitutional right to proceed with the trial.

The panel decision cites United States v. Jaramillo, (panel decision at page 5) for the proposition that where the decision is based on jury bias, the court will overturn the decision only if the trial judge's decision was irrational or irresponsible. This language is not included in Jaramillo, and jury bias was not even in issue. The only language resembling such a statement is the following:

> "Even where a decision is given great deference, however, this court may overturn it if it is irrational or irresponsible."

B. THE PANEL DECISION IS CONTRARY TO THE REASONING IN OTHER APPELLATE DECISIONS WHICH CAREFULLY BALANCE THE NEED FOR A MISTRIAL AGAINST THE RIGHTS OF THE DEFENDANT TO PROCEED TO TRIAL.

In United States v. Sisk, 629 F.2d 1174, 1178 (6th Cir. 1980) cited by the Government at page 8 of its brief, the Court states:

> "But a mistrial is not 'manifestly necessary' simple because the trial judge thinks juror prejudice has arisen; on appeal the source of the prejudice must also be considered in deciding whether retrial of defendants is permissible under the Fifth Amendment."
>
> "When it is a trial judge's uninvited error which gives rise to juror prejudice, the judge may not discharge the jury and subject defendants to a second trial. A contrary rule would enable judges to perfect trial records in an attempt to ensure 'irreversible convictions when they so desired.' Such a rule would also allow trial court's total freedom, through the purposeful commission of error, to harrass defendants with multiple trials."

In United States v. Smith, 621 F.2d 350 (9th Cir.) the Ninth Circuit Justices Thornberry, Choy and Pragerson, stated:

> "When a court, in the absence of manifest necessity declares a mistrial, without the defendant's consent, the double jeopardy clause forbids retrial."
>
> "The record gives no indication that the court here even considered the possibility of a continuance before ordering a mistrial. Since the court did not consider, or have before it the facts necessary for a thorough consideration of, an obvious alternative to a mistrial, we cannot say that there was a 'manifest necessity' to terminate the trial at that time."

In United States v. McKoy, 591 F.2d 218 (3d Cir. 1979) the Third Circuit speaks to the considerations that must be given the Defendant:

> "The Supreme Court recently enumerated some of the significant interests served by the Double Jeopardy Clause in the court's su esponte declaration of a mistrial over a defendant's objection.
>
> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendants' valued right to have his trial completed by a particular tribunal. The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not

completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation or wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutory is entitled to one, and only one, opportunity to require an accused to stand trial. Arizona v. Washington, 434 U.S. 497, 503-505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)."

"Under the Court's analysis in Jorn, supra, the government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial. 400 U.S. at 487, 91 S.Ct. 547. See also Arizona v. Washington, supra, 434 U.S. at 515-16, 98 S.Ct. 824; and only by considering and exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the trial court, our duty is to see that alternatives to declaring a mistrial were completely canvassed. See Dunkerlyey v. Hogan, 579 F.2d 141, 146-47 (2d Cir. 1978); United States v. Grasso, 552 F.2d 46, 52 (2d Cir. 1977); United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir.) cert denied, 412 U.S. 928, 93 S.Ct. 2752, 37 L.Ed.2d 156 (1973)."

CONCLUSION

If this court will consider the facts of this case in light of the material facts and the issue of "Fair Trial", a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals must be granted to the petitioner, Richard A. Jarvis.

Besides being petitioner's last resort, this court is the only tribunal that can make a final determination concerning the application and the rights guaranteed a citizen under the United States Constitution.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to vacate and/or to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

FRANK A. RUBINO, ESQUIRE
3370 Mary Street
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(305) 444-5411

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Gordon Greenberg, Assistant United States Attorney, 312 North Spring Street, Los Angeles, California, 90012, and to the Solicitor General, Department of Justice, Washington, D.C., 20530, this 11th day of July, 1986.

FRANK A. RUBINO, ESQUIRE

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APPENDIX

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs RICHARD A. JARVIS, Defendant.	No. CR 85-856-RMT ORDER DENYING MOTION TO DISMISS

This matter having come before the court on the motion by defendant Richard Jarvis to dismiss the pending indictment against him on the basis that a retrial after the previous declaration of mistrial will violate his Double Jeopardy rights, and this court having considered the pleadings and other documents filed herein and having found that the previous declaration of mistrial was based on "manifest necessity," to wit, prejudice by way of guilt by association,

/ / /

/ / /

/ / /

IT IS ORDERED that the motion by defendant Richard Jarvis to dismiss the pending indictment against him is respectfully denied.

Dated: January 7, 1986.

(s) Robert M. Takasugi,
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 86-5003
	)	
v.	)	D.C.No.CR85-854-RMT
	)	
RICHARD A. JARVIS,	)	
	)	
Defendant-Appellant.	)	MEMORANDUM
	)	
	)	

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding
Argued and Submitted April 8, 1986
Pasadena, California

Before: WALLACE, HUG and NORRIS, Circuit Judges.

This is an appeal of the denial of a motion to dismiss the indictment on double jeopardy grounds after the declaration of a mistrial in a prior proceeding. The only issue on appeal is whether the record reflects the kind of "manifest necessity" in the declaration of the mistrial that is required to avoid the bar of double jeopardy. We have

jurisdiction of the appeal of this pretrial order pursuant to Abney v. United States, 431 U.S. 651, 655-56 (1977); United States v. Ajimura, 598 F.2d 510, 512 (9th Cir. 1979).

On September 4, 1985, defendant Richard Jarvis ("Jarvis") and four others were indicted by a federal grand jury for several narcotics-related offenses. In the indictment, Jarvis is named as the central figure in a scheme to distribute large quantities of cocaine in Southern California.

On November 12, 1985, a jury was empaneled and heard opening statements from the prosecution and from the attorneys for each of the five defendants. Two government witnesses were called and testified. On the second day of trial, after the lunch break, counsel for Jarvis's co-defendants reported to the district court that all the jurors accidentally met Jarvis's four co-defendants at the elevator as they were being transported from the courtroom; the co-defendants were heavily shackled and chained together, and were under the guard of several United States Marshals. The jurors stared

at the four defendants and evidenced a concerned reaction.

The attorneys for the four co-defendants argued that this confrontation would have a prejudicial effect on the jurors and would taint the remainder of the trial. All four of Jarvis's co-defendants moved for a mistrial. At the initial hearing on this matter, the Government argued against a mistrial. At this hearing, Jarvis's counsel made the following remark: "This does not affect my client, Mr. Jarvis, who is out on bond but, in a gesture of good faith, I would be happy to proceed alone if the court grants a mistrial."

After hearing arguments, the district court initially denied the mistrial motion, and the trial continued. Approximately two hours later, the district court recessed the proceedings and requested counsel to enter chambers. In chambers, the judge indicated that he was greatly concerned by the defendants' motion for mistrial and requested further research by the Government.

After hearing additional arguments on the matter, the district judge declared a mistrial. In

reaching his decision, the district judge stated, "after due reflection I believe that the defendants' rights were compromised." The district court stressed that what the jurors saw would have a detrimental effect on rights of all of the defendants to be presumed innocent of the charges. The district court further expressly found that Jarvis's right to a fair trial had been jeopardized because the jurors would infer his "guilt by association" with the other shackled defendants.

After the district judge reached this conclusion, Jarvis's counsel asked the judge if he could comment further and Jarvis's counsel then made the following remarks:

> Very briefly, your honor, with respect to Mr. Jarvis, the court is well aware, for the sake of the record, Mr. Jarvis did not ask for a mistrial and specifically went against a mistrial. Therefore, Mr. Jarvis will be through a second and subsequent trial not by his request.
>
> Therefore I would ask the court that the remedy for this would be a dismissal as to Mr. Jarvis or to proceed with this jury.

After hearing these comments, the district judge reaffirmed his decision to grant a mistrial. Prior to

the rescheduled trial, Jarvis filed a motion to dismiss the indictment on double jeopardy grounds. On January 7, 1986, the district court denied Jarvis's motion, ruling that "manifest necessity" warranted dismissing the jury. This appeal followed.

In a jury trial, "jeopardy attaches when the jury is empaneled and sworn." Crist v. Bretz, 437 U.S. 28, 29 (1978). Even after jeopardy attaches, however, reprosecution is not barred if the trial was terminated because of "manifest necessity." Arizona v. Washington, 434 U.S. 497, 505 (1978). The record must support the explicit or implicit finding of manifest necessity. United States v. Sanders, 591 F.2d 1293, 1299 (9th Cir. 1979).

The degree of deference to be accorded the trial judge's determination of manifest necessity varies with the circumstances of each case. Arizona v. Washington, 434 U.S. at 507-10; United States v. Jaramillo, 745 F.2d 1245, 1248 (9th Cir. 1984), cert. denied, 105 S.Ct. 2142 (1985). The strictest scrutiny is applied to the district court's determination where the accused claims that the

mistrial was intentionally caused by the prosecution. Arizona v. Washington, 434 U.S. at 507-08. At the other end of the spectrum, great deference is accorded the trial judge's conclusion that a mistrial is required because of a deadlocked jury. Id. at 509. Great deference is also warranted when the trial judge decides to declare a mistrial because of possible juror bias. Id. at 511; Sanders, 591 F.2d at 1297.

In Arizona v. Washington, the Supreme Court held that even though a mistrial was not necessary, the evenhanded administration of justice requires that the reviewing court accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment Arizona v. Washington, 434 U.S. at 511. However, even in according this great deference to the trial judge, this court will overturn a decision that is premised on jury bias if it can be shown that the trial judge's decision was irrational or irresponsible. Jaramillo, 745 F.2d at 1248.

Since the incident at the elevator was inadvertent, no prosecutorial misconduct was involved; therefore, the highest degree of deference is accorded the trial judge's determination that a mistrial is necessary to remedy potential jury bias. Arizona v. Washington, 434 U.S. at 511.

In this case, the district court carefully considered the matter and, after due reflection, declared a mistrial. The district court concluded that Jarvis's rights also were compromised by the incident at the elevator since Jarvis was a co-defendant in the trial and the jury could well infer guilt by his association with the other shackled defendants.

There is no showing in the record that the counsel for Jarvis made any arguments to the district judge specifying why the incident at the elevator would not result in prejudice toward Jarvis even though the charge was that he was closely associated with the other defendants. On appeal, Jarvis contends that the inadvertent contact at the elevator was not prejudicial to him and was, in fact, beneficial to his case because he was raising

an entrapment defense and fully intended to admit his association with the other defendants. This argument, advanced for the first time on appeal, is not persuasive. It is obvious that a prior association with the four defendants would tend to undercut his entrapment argument that he lacked a predisposition to commit the crime. The district court had an obligation to consider these circumstances in order to preserve the institutional integrity of a fair trial.

The decision of the district court clearly was not irrational or irresponsible. The district court carefully weighed the alternatives. It was a reasonable conclusion of the district court that the possible jury bias resulting from the incident could adversely affect Jarvis's opportunity for a fair trial because he was named as a central figure in the narcotics transactions. The district court's determination that potential juror bias justified a mistrial under the manifest necessity standard was rational and adequately supported by the record. We therefore affirm the district court's order denying

Jarvis's motion to dismiss the indictment on double jeopardy grounds.

AFFIRMED.*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

PETITION FOR REHEARING

BY PANEL AND EN BANC

The Petition was filed on May 5, 1986. On May 14, 1986, an oral denial was rendered by the Ninth Circuit Court of Appeals. No written or recorded copy of this denial was made.

Respectfully submitted,

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